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NO. 86-1704

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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JOHN N. BROWN, and the
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Petitioners,

vs.

LONNIE JOE DUTTON,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

MEMORANDUM OF RESPONDENT DUTTON
IN RESPONSE TO PETITION
FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an alleged procedural default can serve as an adequate and independent state ground for a state court ruling when the state appellate court has been presented with and ruled upon the merits of a claim, when state law does not regularly treat the acts of defendant's trial attorney as a procedural default, and when the state has itself conceded that the appellate ruling was on the merits?
2. Whether a state waives its defense of procedural default to a federal habeas petition when the state raises the default issue for the first time in its supplemental brief to the Court of Appeals on rehearing en banc?

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RELEVANT STATUTORY PROVISIONS

The code governing post-conviction procedures in Oklahoma provides in relevant parts:

Any person who has been convicted of, or sentenced for, a crime and who claims:

(a) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state . . . may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence.

Okla.Stat.Ann. tit. 22, section 1080 (West 1986).

All grounds for relief available to an applicant under this act must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

Okla.Stat.Ann. tit. 22, section 1086 (West 1986).

v

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1986

JOHN N. BROWN and the
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Petitioners,

vs.

LONNIE JOE DUTTON,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

MEMORANDUM OF RESPONDENT DUTTON
IN RESPONSE TO PETITION
FOR WRIT OF CERTIORARI

Respondent Lonnie Joe Dutton submits this memorandum in response to the petition for writ of certiorari filed by the Petitioner, John N. Brown on April 20, 1987 and received by Mr. James Berry, attorney for Respondent Lonnie Dutton, on April 21, 1987, seeking review of the opinion of the United States Court of Appeals for the Tenth Circuit in Dutton v. Brown, which is officially reported at 812 F.2d 593 (10th Cir. 1987)(en banc).

STATEMENT OF THE CASE

Respondent writes briefly to correct certain misimpressions conveyed by Petitioner's Statement of the Case. At the sentencing phase of his trial, Lonnie Dutton's attorney attempted to call Mr. Dutton's mother to testify. The trial court prohibited her from testifying on the ground that she had been in court for the entire trial despite the invocation of the Rule of Sequestration. The Tenth Circuit Court of Appeals on rehearing en banc held that her testimony should have been admitted under the principles announced in Lockett v. Ohio, 438 U.S. 566 (1978) and the cases following Lockett. Dutton v. Oklahoma, 812 F.2d 593, 601 (10th

Cir. 1967)(en banc). The Petition does not attack this holding, but the Statement of the Case in the Petition implies that the courts below found little mitigating weight to the evidence which was excluded. This implication is plainly wrong with respect to the judgment of the en banc Court of Appeals. Mr. Dutton's trial attorney attempted to show at sentencing that Mr. Dutton was in fear and acted under the direction of the older codefendant in the crime: his mother's testimony would have shown that Mr. Dutton's tragic family life and emotional instability left him prone to the domination of older men.¹ The Tenth Circuit unanimously reversed and remanded. Five judges, one of whom wrote separately, joined Judge Baldoe's opinion, and two judges concurred separately. All the judges agreed that the trial court improperly excluded relevant mitigating evidence "central to his mitigation defense." Dutton, 612 F.2d at 603 (Barrett, concurring).

The procedural default issues raised by the Petition are based on a misreading of the holdings of the Oklahoma Court of Criminal Appeals on direct appeal and on post-conviction relief. On direct appeal, the Court of Criminal Appeals found no procedural default and addressed the merits of the issue concerning the exclusion of Mrs. Dutton's testimony. The order of the Oklahoma Court of Criminal Appeals in post-conviction relief is consistent with and strengthens Respondent's contention that the Oklahoma court decided the exclusion issue on the merits on direct appeal. The substance of Respondent's argument in this regard is set forth below.

REASONS WHY THE COURT SHOULD DENY THE WRIT

There are at least two reasons why the Supreme Court should deny the Petition for a Writ of Certiorari in this case. First, on direct appeal, the Oklahoma Court of Criminal Appeals ruled on

¹ Respondent is filing a Cross-Petition for Certiorari asking that this Court reverse the Tenth Circuit's ruling against Respondent's ineffective assistance of counsel claim; the Statement of the Case there fully sets out the mitigation evidence excluded by the trial court.

the merits of the exclusion of Mrs. Dutton's testimony; it did not find that the failure of Respondent's attorney to make an offer of the mother's testimony procedurally barred the Respondent's claim. Second, as Petitioner has admitted, the Petitioner did not raise this procedural bar issue until filing a brief on rehearing in the Court of Appeals. Petition at 11-12. The failure to raise procedural default at the District Court level is itself a waiver which cannot be avoided by a last-ditch effort to revive the defense by raising it at rehearing in the Court of Appeals.

For these reasons, the Court of Appeals decision to reach the merits of the exclusion of Mrs. Dutton's testimony was plainly correct. Relying on settled doctrines governing the application of the procedural default defense, the Court of Appeals neither broke new ground nor strayed from the doctrines in deciding to reach the merits of this issue.

I. THE OKLAHOMA COURT OF CRIMINAL APPEALS RULED ON THE MERITS OF THE EXCLUSION CLAIM ON DIRECT APPEAL.

The Petitioner argues that on direct appeal, the Oklahoma Court of Criminal Appeals found that the failure of Respondent's trial counsel to make an offer of the testimony of Mrs. Dutton acted as a procedural bar to raising the unconstitutional exclusion of her testimony. In support of his contention the Petitioner quotes the opinion of the Court of Criminal Appeals out of context, misconstrues the opinion of the Tenth Circuit, and contradicts his own assertions in the brief he filed in post-conviction proceedings before the Oklahoma Court of Criminal Appeals on October 29, 1984.

Respondent's attorney objected to the exclusion of Mrs. Dutton's testimony at trial, and Respondent raised the issue on direct appeal. Notwithstanding the contention made by Petitioner, the Court of Criminal Appeals addressed the merits of the issue of the excluded testimony in its opinion. The entirety

of the Oklahoma court's discussion is set out in the margin.²

As the Oklahoma Court of Criminal Appeals explained, it examined the entire record to deduce what Mrs. Dutton's testimony would have been. In doing so, the court was following clearly established state law. The relevant statute provides that error may be found when the substance of the excluded testimony "is apparent from the context within which questions were asked." Okla.Stat.Ann. title 12, section 2104 (West 1980). So long as the substance can be determined, the failure to make an offer is not considered a procedural default. Thus, in In the Matter of the Adoption of C.M.G., 656 P.2d 262, 266 (Okla. 1982), the Oklahoma Supreme Court held that a formal offer of proof need not be made "if the significance of the excluded evidence is shown." The appellant in C.M.G. attempted to testify that she had fulfilled her support obligation by in-kind gifts. No offer was made of her testimony after the trial court announced it would not consider evidence of the in-kind payments, as a matter of law, in the belief that only cash payments were material to a support issue. The Oklahoma Supreme Court reversed. Id. at 267. See also Yeager v. Farmer, 549 P.2d 345 (Okla. 1976) (refusal to consider an entire class of evidence meant that no offer was

² In a capital case, this court will carefully review the record and consider all matters presented which are supported by the record. Hathcox v. State, 94 Okl.Cr. 110, 230 P.2d 927 (1951); Parish v. State, 77 Okl.Cr. 436, 142 P.2d 642 (1943). Appellant requested at the beginning of trial that all witnesses be sequestered. See 12 O.S. 1981, section 2615. Appellant's mother remained in the courtroom during all of the proceedings. Defense counsel attempted to call her as a witness during the sentencing stage, but, the trial judge refused to permit her to testify. Appellant asserts that this was an abuse of discretion.

We are unable to discern from the record what testimony in mitigation appellant's mother would have presented. The exclusion of evidence is not ground for error unless a party makes a record of the proposed evidence or the proposed evidence is obvious from the context. 12 O.S.1981, section 2104(A)(2). Appellant's mother and father testified prior to formal sentencing that appellant had been committed to hospitals on several occasions for treatment of his emotional problems. Assuming that this is the same evidence the mother would have given in mitigation, there was no harm resulting to appellant. There was no claimed defense of insanity or drug intoxication. The hospitalization she described occurred four or five years prior to the alleged crime. This evidence was inconsequential to the defense of duress. Dutton v. Oklahoma, 674 P.2d 1134, 1140 (Okla. Crim. App. 1984).

necessary).

The Tenth Circuit also had no problem in divining what the mother's testimony would have been. Not only was the significance of the excluded testimony shown by her testimony prior to sentencing, but "Moreover, during his opening remarks, trial counsel generally informed the court what he intended to show through the testimony of his two witnesses. These remarks sufficiently alerted the trial judge to the nature and tenor of Mrs. Dutton's testimony and that such testimony was likely to be relevant evidence." Dutton, 812 F.2d at 601.

Although the Oklahoma Court of Criminal Appeals reached the exclusion issue, the court decided it incorrectly, not discussing the significance of *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Eddings held that the refusal of Oklahoma courts to consider as a matter of law relevant mitigating evidence was unconstitutional under the Eighth Amendment. The refusal of the Oklahoma courts here to consider the mitigating evidence of Mr. Dutton was found by the Tenth Circuit to be unconstitutional as well. Dutton, 812 F.2d at 601.³

³ One clarification of the Oklahoma court's direct appeal opinion needs to be made. The decision is couched in terms of abuse of discretion, not the denial of a constitutional right. On this basis, Petitioner claims "the Tenth Circuit conceded that the Defendant had not properly preserved his constitutional issue on direct appeal." *Dutton v. Brown*, 812 F.2d at 599, n.7; Petition at 16, thereby suggesting there was a second kind of procedural default in addition to the failure to make a formal offer of proof at trial. However, Petitioner has misconstrued both the Tenth Circuit's opinion and the Court of Criminal Appeal's opinion. The Tenth Circuit addressed the procedural default issue in a footnote: it found no procedural bar since the state trial court had considered the exclusion issue in post-conviction relief, and thus had no need to decide whether the Oklahoma Court of Criminal Appeals had declared a procedural default in its direct appeal opinion. On the basis of the state court's framing of the issue as an abuse of discretion, however, the Tenth Circuit observed, "We are aware that petitioner [i.e. Dutton] may not have challenged Mrs. Dutton's exclusion on constitutional grounds on direct appeal." Dutton, 812 F.2d at 599 (emphasis added).

Even though the Court of Criminal Appeal's opinion suggests there was an appellate default on the constitutional issue, the record reveals that there plainly was none. In fact, the Respondent did raise the constitutional issue of exclusion of mitigating evidence in his brief on direct appeal, citing to *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Brief for Appellant at 83-85, *Dutton v. Oklahoma*, 674 F.2d 1134 (Okla. Crim. App. 1984).

Any doubt whether the Court of Criminal Appeals decided the exclusion issue on its merits is resolved by the Court's subsequent order affirming the dismissal of Respondent's post-conviction application. Respondent again raised the issue of exclusion of Mrs. Dutton's testimony in his application for post-conviction relief. As Petitioner notes, the Oklahoma trial court decided this claim on the merits. Petition 8-9. On appeal, the Oklahoma Criminal Court of Appeals decided that all the points raised by the Respondent were barred by res judicata. Dutton v. Oklahoma, No. PC-84-382 at 2 (Okla. Crim. App. February 2, 1985). As used in Mr. Dutton's case, res judicata meant that the issues were either raised or could have been raised before. *Id.*

The Petitioner claims that the Oklahoma Court of Criminal Appeals order affirming the denial of post-conviction relief on grounds of res judicata meant that the constitutional issue could have been but was not raised on direct appeal. In fact, Petitioner has misread Oklahoma law regarding res judicata in post-conviction criminal proceedings. Properly understood, the post-conviction order of the Oklahoma Court of Criminal Appeals can only have one meaning: that the Court did decide the issue on direct appeal.

Petitioner's primary case on which he relies to describe the effects of res judicata, *Estate of Severson v. Severson*, 630 P.2d 634 (Okla. 1982), is a civil case. The application of res judicata principles in collateral proceedings in criminal cases is governed instead by the statute described in the paragraph below. Severson's res judicata discussion is irrelevant to criminal post-conviction relief.

Oklahoma Statutes, title 22, sections 1080 and 1086 govern all motions for post-conviction relief in criminal cases. Okla. Stat. Ann. tit. 22, section 1080 (West 1980). Section 1080 provides that any person convicted of a crime who claims that his conviction was obtained in violation of the Constitution of the

United States may file under the act. Okla. Stat. Ann. tit. 22, section 1080(a). Section 1086 has been interpreted by the Oklahoma courts to apply to the original application for relief under the act, although by its terms the section apparently refers to applications subsequent to the initial application. See *Jones v. Oklahoma*, 704 P.2d 1138 (Okla. Crim. App. 1985). The section excludes from review all grounds which were or could have been raised on direct appeal "unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application." Okla. Stat. Ann., tit. 22, section 1080 (West 1986). The second exception has been interpreted to allow relief where the bypass occurs because of the procedural error of counsel. *Jones*, 704 P.2d at 1140.

Had the Oklahoma Court of Criminal Appeals not decided Respondent's Lockett issue on direct appeal, as Petitioner asserts, then the issue would have been a valid one to raise in post-conviction. It is a constitutional issue, qualifying under Title 22, section 1080, and it was inadequately raised in the prior proceeding, i.e. it was a bypass due to the error of counsel. Such a claim can clearly be raised in post-conviction applications in Oklahoma. *Jones*, 704 P.2d 1138. Accordingly, in these circumstances, the Oklahoma Court of Criminal Appeals would not have dismissed the claim as res judicata.

Thus, the only meaning that the order affirming the dismissal of Respondent's post-conviction application can have is that the Court had already decided the issue on direct appeal.

This was precisely the position which the State of Oklahoma itself argued in the post-conviction proceedings before the Oklahoma Court of Criminal Appeals. In a brief which the State filed in the Oklahoma Court of Criminal Appeals in support of the trial court's denial of post-conviction relief, the State said:

"However, this Court, in Petitioner's [i.e. Dutton's] direct appeal, exhaustedly addressed the Petitioner's allegation that it was error for the trial court to disallow Petitioner's mother's testimony during the second stage of the trial since she had violated the Rule of Sequestration Moreover, this precise

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"However, this Court, in Petitioner's [i.e. Dutton's] direct appeal, exhaustedly addressed the Petitioner's allegation that it was error for the trial court to disallow Petitioner's mother's testimony during the second stage of the trial since she had violated the Rule of Sequestration Moreover, this precise

issue was conclusively determined by this court as stated above, and therefore this matter is res judicata, and cannot be raised through post-conviction."

Brief for Appellant/Respondent at 12-14, appendix B at 2-4. The state trial court in addressing Mr. Dutton's application for post-conviction relief confirmed as well that the Court of Criminal Appeals had addressed the exclusion issue. See Oklahoma v. Dutton, No. CRF-79-105 at 3 (Dist. Ct., Oklahoma County, Oklahoma Sept. 5, 1984) contained at Petition at 5d. Where Petitioner has previously stated that the state court ruled on the matter, this Court should be wary of accepting the contention by Petitioner now that the state court did not so rule.

In these circumstances, Petitioner's claim of procedural default is simply untenable. Where the Respondent squarely presented the constitutional issue of exclusion of mitigating evidence to the Oklahoma Court of Criminal Appeals on direct appeal, where the opinion reveals that the Court extensively discussed the merits of the issue, where the Tenth Circuit found that the state courts had not based their decisions on procedural default, and where the Petitioner himself has asserted that the Court of Criminal Appeals had reached the issue, there can be no other conclusion.

Even though on its face the state opinion is ambiguous as to whether it decides an issue on the merits or on grounds of procedural default, federal courts must reach the merits under these circumstances. See County Court of Ulster County, New York v. Allen, 442 U.S. 140 (1979) (unclear basis of decision combined with lack of support for procedural default in state law allowed federal review); Accord Campbell v. Wainwright, 738 F.2d 1573, 1575 (11th Cir. 1984); Oliver v. Wainwright, 795 F.2d 1524, 1528-9 (11th Cir. 1986), modified 805 F.2d 371 (11th Cir. 1986); Morishita v. Morris, 702 F.2d 207 (10th Cir. 1983). In doing so here, the Tenth Circuit did no more than follow settled principles of law.

III. THE STATE WAIVED ITS CLAIMS OF PROCEDURAL DEFAULT BY NOT RAISING THE DEFENSE OF PROCEDURAL DEFAULT IN THE UNITED STATES DISTRICT COURT.

After exhausting his state remedies, the Respondent filed a petition for habeas corpus in the United States District Court for the Western District of Oklahoma. The Respondent alleged, *inter alia*, that he had been deprived of his constitutional right to present mitigating evidence by the state trial court. The State of Oklahoma did not argue that Respondent had procedurally defaulted by failing to make an offer of proof at trial. The State did not mention its contention in its brief in opposition or any other filing or statement in court. In fact, the State did not bring up procedural default argument in its brief to the panel of the Tenth Circuit; it only raised it for the first time in its briefs to the Court rehearing this case en banc.

The lower federal courts are unanimous in holding that the failure of the State to raise procedural default at the district court waives the defense. *Ortega v. McCotter*, 608 F.2d 406, 407 (5th Cir. 1987); *Barrera v. Young*, 794 F.2d 1264, 1267-1269 (7th Cir. 1986); *Boykins v. Wainwright* 737 F.2d 1539, 1545 (11th Cir. 1984), *cert denied* 470 U.S. 1059 (1985); *Crisp v. Mayabb*, 668 F.2d 1127, 1136 (10th Cir.), *cert denied* 459 U.S. 827 (1982). Petitioner's failure to raise his procedural default defense in district court here must preclude him from raising it in this Court as well. The federal district court has as much right as state courts to insist that all claims be before it. Waiver in habeas jurisprudence insures that both parties will present all their claims to the district courts.

The Supreme Court has also approved this line of reasoning. In *Estelle v. Smith*, 451 U.S. 454 (1981), the Court held, *inter alia*, that the introduction of a psychiatrist's testimony who had examined the defendant at a pretrial competency hearing without reading the defendant his Miranda rights violated the defendant's Fifth Amendment privilege against compelled self-incrimination. The Court approved the reasoning of the Fifth Circuit in rejecting Texas's contention that the defendant had waived his

Fifth Amendment claim by not specifically objecting on Fifth Amendment grounds to the testimony at trial. *Id* at 468, n. 12. The Fifth Circuit in part based its rejection of the procedural default defense on the failure of the state to raise the argument in the United States District Court until the state moved for a new trial. This failure was held to constitute a waiver by the state. *Smith v. Estelle*, 602 F.2d 694, 708 (5th Cir. 1979). The State of Oklahoma in the courts below was even more tardy than Texas was in *Smith* in asserting its procedural default defense; only when the Tenth Circuit granted rehearing in the case did it occur to Oklahoma to raise the issue.

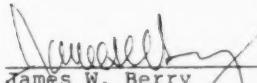
Precedent is clear that the actions of Oklahoma in federal court constitute a waiver of their procedural default defense. Oklahoma's waiver is an independent reason for upholding the decision of the Tenth Circuit to address the unconstitutional exclusion of the mitigating evidence of the Respondent despite the belated contention of Oklahoma that the Respondent procedurally defaulted.

CONCLUSION

The petition for certiorari in this case should be denied.

Dated: May 21, 1987.

Respectfully submitted,



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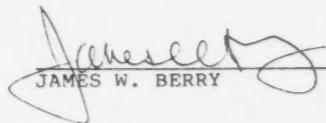
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CERTIFICATE OF SERVICE

I, JAMES W. BERRY, a member of the Bar of this Court, hereby certify that one (1) copy of the foregoing was mailed by first-class, postage pre-paid mail to:

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JAMES W. BERRY

DATED: May 21, 1987

NO. F-79-337

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LONNIE JOE DUTTON,
Appellant,

v.

THE STATE OF OKLAHOMA,
Appellee.

BRIEF IN CHIEF OF APPELLANT

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November, 1982

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to make an offer of proof. But, it is clear that she was being called to offer some mitigation to justify life as opposed to death.

Title 21 O.S., Section 701.10 provides in part as follows:

"In the sentencing proceedings, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act."

In reviewing the record during the second phase, it is apparent that nothing was offered to support mitigation. Appellant was not even given half of an attempt to a fighting chance. The only mitigation offered was that of his mother, who knew virtually nothing about the merits of the case, yet the Court invoked a technicality and prohibited her from testifying. This surely could not have been the fault of appellant, but rather the fault of defense counsel who apparently failed to exercise enough foresight to anticipate calling the mother if appellant was found guilty of First Degree Murder.

Brewer's feeble attempts to mitigate fell far short of procedural due process as guaranteed to appellant in the Second Stage of a First Degree Murder case, and, therefore, should be reversed and remanded for a new trial, or in the alternative, for any other relief this Court may deem just and proper.

The Trial Court abused his discretion in disallowing her testimony. (See Eddings v. Oklahoma, 102 S.Ct. 869 (1982).